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No. 184 and No. 185

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, et al.,

Appellants,

VERSUS

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as Douglas Optical; and ORAN RIPS,

Respondents.

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as Douglas Optical; and ORAN RIPS,

Appellants,

VERSUS

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, et al.,

Respondents.

BRIEF OF THE APPELLANTS, MAC Q. WILLIAMSON, ATTORNEY GENERAL OF OKLAHOMA, ET AL.

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January, 1955.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

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In the
Supreme Court of the United States
OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, ET AL.,
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Respondents.

BRIEF OF THE APPELLANTS, MAC Q. WILLIAMSON, ATTORNEY GENERAL OF OKLAHOMA, ET AL.

I

Opinion Below

The opinion and partial dissent thereto of the United States District Court for the Western District of Oklahoma in this cause is reported in 120 F.Supp. 128. Said opinion

appears on page 36 of the Transcript of Record. The partial dissent of Circuit Judge Murrah appears on page 62 of said record.

II

Jurisdiction

This is a civil action commenced by the respondents in the United States District Court for the Western District of Oklahoma in which they seek (R. 13—prayer of complaint) to have House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953—59 Okla. St. Ann. §§ 941-947), relating to the visual care of Oklahoma citizens, declared unconstitutional and void under Section 2201 of the Judicial Code of the United States (28 U.S.C.A., § 2201) and state officials enjoined from enforcing the same under Sections 2201 and 2202 of the Judicial Code of the United States (28 U.S.C.A., §§ 2201 and 2202), for the alleged reason that portions of said Act violate Sections 8 (Interstate Commerce) and 10 (Obligation of Contracts), Article 1 of the Constitution of the United States and the "due process" and "equal protection" clauses of Article 1 of the XIV Amendment to the Constitution of the United States.

As required by Section 2281 of the Judicial Code of the United States (28 U.S.C.A., § 2281), the matter was heard by a district court of three judges. On the 29th of March, 1954, the three-judge court, with the Circuit Judge dissenting in part, entered and filed its Judgment and Decree (R. 27). The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sec-

tion 1253 of the Judicial Code of the United States (28 U.S.C.A., § 1253). Probable jurisdiction was noted herein (R. 487). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment and decision of the District Court on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn.*, 47 Sup. Ct. 88, 272 U.S. 295, 71 L. Ed. 243; *Interstate Busses Corp.* v. *Blodgett*, 48 Sup. Ct. 230, 276 U.S. 245, 72 L. Ed. 551; *Herkness* v. *Irion*, 49 Sup. Ct. 40, 278 U.S. 92, 73 L.Ed. 198.

III

Question Presented

The primary question presented in this appeal is whether or not said Act of the Oklahoma Legislature, relating to the visual care of the public, is so clearly violative of the constitutional and statutory provisions of the United States, referred to in the complaint, as to warrant the three-judge Federal District Court:

(a) entering a declaratory judgment holding *certain provisions* of said Act unconstitutional and void (see concluding portion of the "Statement" herein), and

(b) issuing an order enjoining the Attorney General of Oklahoma and each of the 77 County Attorneys of said State from enforcing or attempting to enforce *such provisions of said Act* by criminal or civil proceedings authorized therein.

IV

Statute Involved

The statute of the State of Oklahoma involved is House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953—59 Okla. St. Ann., §§ 941-947). Said bill, with Sections 2, 3, 4, 5 and 6 thereof divided for sake of clarity into their constituent parts, is attached as an APPENDIX hereto.

V

Statement

House Bill 953 is an act relating to the visual care of the people of Oklahoma. Its primary aim is to assure that the citizens of Oklahoma receive the best possible visual care and to protect the public against various activities in the field of visual care which the Oklahoma Legislature deemed detrimental to the public interest, health and welfare. To a certain extent, the activities of the ophthalmologist and the optometrist (that is, persons licensed under the provisions of Chapters 11 or 13, Title 59, Oklahoma Statutes 1951—see Section 1 of said house bill), both *professional practitioners* in the field of visual care, and the activities of the optician, *a non-professional* in the field of visual care (not licensed in Oklahoma), are regulated and controlled by the provisions of this law as their activities pertain to the visual care of the public. In other words, it is not a medical law, or an optometry law, or an optician law. As its title indicates, it is a law relating to visual care,

and its provisions embrace the activities of all those involved in furnishing corrective eyeglasses and visual care to the public.

Section 2 of House Bill 953 provides for professional responsibility in the matter of prescribing, fitting, adapting and duplicating eyeglasses for visual correction, but authorizes the optician to prepare or grind lenses, fit and adapt eyeglasses to the face, and to duplicate a lens provided he has the professional's prescription for the eyeglasses in his shop. And the optician may continue to do said acts on said prescription.

Section 3 of House Bill 953 prohibits the solicitation of the sale of eyeglasses, lenses, frames, mountings, etc., through advertising means by any person, be he ophthalmologist, optometrist or optician. This section is aimed at protecting the public from bait and misleading advertising and other unscrupulous and unethical means of advertising whereby the visual care of the public is handled without proper professional care and responsibility.

Section 4 of House Bill 953 prohibits rebates, the solicitation of eye examinations, the hiring of physicians or optometrists to make eye examinations by lay persons or companies, and in furtherance of such prohibition against the "corporate practice" of ophthalmology or optometry, prohibits a retail merchandising establishment from subleasing departments or renting space to doctors wherein they may examine eyes for corrective eyeglasses.

The District Court has declared (R. 27) the following portions of Section 2 of House Bill 953 to be unconstitutional and void:

"(a) Those portions of Section 2, Title 59, Chapter 24, Section 942, Oklahoma Statutes, which make it unlawful for any person not a licensed optometrist or ophthalmologist 'to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *' or 'to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *' except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;"

Circuit Judge Murrah concurred (R. 62) in the above portion of the opinion and judgment "with reluctance and some misgivings."

The District Court, with Circuit Judge Murrah dissenting, declared (R. 28) the following portion of Section 3 of said House bill to be unconstitutional and void:

"(b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful 'to solicit the sale of * * * frames, mountings * * * or any other optical appliances'."

The District Court, with Circuit Judge Murrah dissenting, declared (R. 28) the following portion of Section 4 of House Bill 953 to be unconstitutional and void:

"(c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma Statutes), which provides that

'No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or

otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store'."

The District Court *did not hold invalid* those portions of Sections 3 and 4 of House Bill 953 which:

(a) Make it unlawful for any person, firm, company, corporation, or partnership "to solicit the sale of spectacles, eyeglasses, lenses, * * * prisms, * * * by radio, window display, television, telephone directory display advertising, or by any other means of advertising"; or

(b) Make it unlawful for any person, firm, company corporation, or partnership "to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction"; or

(c) Make it unlawful for any corporation, lay body, organization, group, or lay person "in any manner to make an eye examination or perform any visual correction through the means of engaging the services, on a salary, commission, or any other compensatory basis, of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951;"

and it was for that reason "Defendants' *Proposed* Judgment and Decree" (R. 24), filed at the request of the District Court (R. 62) after the rendition of its opinion herein (R. 36), *included paragraph "(3)"* (R. 26), enjoining and restraining plaintiffs (respondents here) from violating the last-mentioned portions of said Act. However, by an examination of the "Judgment and Decree" of the District

Court (R. 27), it will be found that same *does not either grant or deny* such injunctive relief, or even refer thereto.

In this connection it will be noted that respondents in the prayer of their complaint (R. 13, 14) asked the District Court to declare the entire Act involved here to be unconstitutional and void under the Constitution of the United States and Section 1 of the Fourteenth Amendment thereto, and to enjoin appellants from enforcing or attempting to enforce the same, and that appellants by counterclaim (R. 22, 23) asked the District Court to declare the entire Act to be constitutional and valid, and (based upon continuing violations admitted in respondents' complaint) to enjoin future violations thereof by respondents.

VI

Summary of Argument

It is the contention of appellants that the furnishing of corrective eyeglasses to the public involves the public health and welfare and that all provisions of House Bill 953 were enacted by the Oklahoma Legislature in the valid exercise of the police power of the State.

Sections 1 and 2 of the Act provide that the citizens of Oklahoma shall receive the best possible visual care and that no person other than a duly licensed physician or optometrist shall fit, adjust, adapt, or apply lenses, frames or prisms to the face of a person or duplicate lenses or give treatment to aid human vision, except that a physician or optometrist by written prescription may authorize an optical supplier, in accordance therewith, to measure, adapt, fit, prepare, dispense, or adjust eyeglasses for the correc-

tion of human vision, and the physician or optometrist shall remain responsible for the full effects of appliances furnished by the optical supplier.

Appellants firmly contend that Sections 1 and 2, *supra*, are valid enactments under the police power of the State of Oklahoma in the interest of public health and welfare *under the principles of law announced by this Court in* the case of *Roschen* v. *Ward, Attorney General of the State of New York*, 279 U.S. 337, 72 L. Ed. 722, and decisions from the supreme courts of many states which follow this leading case. See: *Commonwealth* v. *Kresge Company* (Mass., 1929), 166 N.E. 558; *Ritholz* v. *Commonwealth* (Va., 1945), 35 S.E.2d 210; and *City of Springfield* v. *Hurst* (Ohio, 1944), 56 N.E.2d 185. Appellants emphasize that Sections 1 and 2 of the Act do not eliminate the dispensing opticians. They merely require that the dispensing optician perform his services under the prescriptive authority of a professional practitioner who is licensed by the State and by this Act made responsible for the eye care of his patients.

Section 3 of the Act prohibits soliciting the sale of eyeglasses by advertising and applies to all persons. It is aimed at the elimination of bait and misleading advertising in a field involving the public health and welfare and is for the protection of the public. The right of the legislatures of the several states to regulate or prohibit advertising in a field involving the public health and welfare has been upheld by this Court in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L. Ed. 1086, wherein the litigants were reminded in a case involving dentistry that the Legislature of Oregon

> "was not dealing with traders in commodities but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place."

The principles of law above announced were followed by the Supreme Court of Oklahoma in *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P.2d 429. The Legislature of Oklahoma was acting within the scope of its police power in a matter of vital interest to public health and welfare in the enactment of Section *3, supra.*

The portion of Section 4 of the Act under attack relates to the prohibition against persons purporting to do eye examinations from renting space or subleasing departments in retail merchandising stores. This prohibition is a regulation of the professions of medicine and optometry, since only physicians and optometrists can legally make eye examinations in Oklahoma. The authority of the state legislatures to regulate the practice of professions which affect the public health and welfare is not open to dispute according to the case of *Semler* v. *Oregon State Board of Dental Examiners, supra.*

ARGUMENT AND AUTHORITIES

General Statement

On September 3, 1953, three days before House Bill 953 went into effect, this action was filed in the United States District Court for the Western District of Oklahoma *by the respondents*, Lee Optical of Oklahoma, Inc., and Ellis Carp, d/b/a Douglas Optical of Tulsa, Oklahoma, which companies are owned and operated by said Ellis

Carp of Dallas, who also owns or has an interest in and operates 35 optical companies in Texas (R. 209) and an optical supply house (DalTex Company—R. 214) in Dallas, which grinds lenses for all of said optical companies, and *by the respondent*, Oran Rips, M. D., who has an office leased from and in the place of business of the Zales Jewelry Company in Tulsa (in which Douglas Optical also has a place of business), who testified (R. 200) that his said office lease was "worth to me $25,000."

Respondents asked said District Court (R. 13) to declare House Bill 953 to be unconstitutional and void, and to thereon enjoin the appellants, Attorney General and 77 County Attorneys of Oklahoma, from enforcing said law as against them *and thereby permit* respondents to continue to carry on their optical businesses and services as outlined in paragraph 11 of their complaint (R. 5), including the advertisement of said businesses and services

> "in newspapers, magazines, by radio, television and by other media of publication."

In this connection appellants respectfully call attention to the testimony of the *respondent, Ellis Carp* (R. 204-220), including his testimony (R. 216-217) concerning Joseph T. Conti, an osteopath formerly employed on a salary basis by him in Texas, who, while authorized to practice osteopathy in Oklahoma (59 O.S. 1951, § 621), is now illegally practicing optometry (59 O.S. 1951, § 589) in connection with Lee Optical in Oklahoma City (R. 200). Appellants further call attention to the testimony of the *respondent, Oran Rips, M.D.* (R. 199-204), also formerly employed on a salary basis by Ellis Carp in Texas, who now

practices optometry in connection with Douglas Optical in Tulsa, as aforesaid. Said testimony of the respondents herein clearly reveals the *type of business* repondents are now asking this Court to in effect legalize by declaring House Bill 953 unconstitutional and void and by enjoining the Attorney General and 77 County Attorneys of Oklahoma from enforcing its provisions as against them. The nature of said type of business is fully presented in Circuit Judge Murrah's partial dissent herein (R. 64 to 67) and in the references to said dissent which appears on pages 51 and 70 of this brief.

It is, therefore, clear that the essential issue involved in this appeal is as follows:

> Is House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature so clearly violative of the constitutional and statutory provisions of the United States, referred to in the complaint, as to authorize or require the three-judge Federal District Court:
>
> (a) to enter a declaratory judgment in the above cause holding *certain provisions* of said Act unconstitutional and void (see concluding portion of the foregoing "Statement" herein), and
>
> (b) to issue an order in said cause enjoining the Attorney General of Oklahoma and each of the 77 County Attorneys of said State from enforcing or attempting to enforce such provisions of said Act by criminal or civil proceedings authorized therein.

In this connection it will be noted that House Bill 953 relates not only to *opticians* (optical companies) of the State but to licensed *optometrists* and to *physicians* (usually referred to as ophthalmologists or oculists) practicing optometry. It will also be noted:

1. That the Legislature of Oklahoma has never enacted a statute which requires an *optician of this State*, before he is entitled to practice his trade or occupation therein, to possess prescribed educational qualifications or be of good moral character, or to pass a required examination and procure a license as a qualified optician, hence any person in this State, whether skilled or unskilled in the trade or occupation of an optician, and regardless of his educational requirements or moral character, may operate as an optician in this State and (unless prevented by House Bill 953) *by an extensive advertising program solicit and obtain a large and lucrative practice.*

2. That 59 O.S. 1951, §§ 581 and 584 require an *optometrist in this State*, before he is entitled to practice his profession therein, to possess prescribed educational qualifications and be of good moral character. It will be further noted that said sections in effect provide that the practice of optometry in Oklahoma includes the science and art of "examining the human eye," as well as of "correcting or relief of ocular abnormalities," and that the required examination of applicants for a license to so practice covers many subjects, *including biology, bacteriology, ocular pathology, ocular neurology and ocular myology;* knowledge in said subjects by an optometrist being necessary to enable him to determine, *while examining the human eye*, if the ocular abnormality complained of, such as squint, etc., is caused by syphillis, focal infection, diabetes, or other pathological conditions which should be treated by the use of drugs or surgery by physicians and surgeons, rather than corrected or relieved by the use of lenses or prisms by optometrist, and

3. That 59 O.S. 1951, §§ 492 and 494 require a *physician of this State* (including an ophthalmologist or oculist), before he is entitled to practice his profession therein, to possess prescribed educational qualifications and to be of good moral character. It will be further noted that said sections, as well as 59 O.S. 1951, § 589, authorize physicians to practice optometry in this State and that the required examination of applicants for a license as a physician covers many subjects, including anatomy, physiology, hygiene, chemistry, surgery, obstetrics, gynecology, bacteriology, pathology, medical jurisprudence and meteria medica.

Respondents, as aforesaid, seek to have this Court declare said house bill, which regulates the furnishing of corrective optical goods to the citizens of Oklahoma, to be invalid and unconstitutional. In general, respondents object to said Act because:

(a) It requires opticians to have a written prescription from a physician or optometrist before they may supply corrective glasses to the public.

(b) It prohibits all persons from soliciting eye examinations and the sale of corrective glasses by means of advertising, and

(c) It forbids "corporate" or "commercial" practice in making eye examinations, and in furtherance thereof prohibits rental of space in retail merchandising stores for the purpose of making eye examinations.

Appellants believe that the purpose and intent of House Bill 953 is to assure that the people of Oklahoma receive the best possible visual care through the atten-

tion (and responsibility) of professional practitioners, namely, licensed physicians and optometrists, and not by unlicensed, non-professional persons or commercial interests except pursuant to prescriptive authority, and to establish regulations pertaining to the sale of corrective eyeglasses to the public. The Act involved is separate from, but cumulative to, the medical and optometry laws of Oklahoma.

For the purpose of this brief appellants propose the separation of the Act into three distinct parts:

> The *first* will involve Sections 1 and 2 thereof, which pertain to eye examinations and the furnishing of corrective eyeglasses to the public;
>
> The *second* will involve Section 3, which pertains to advertising, a portion of which is also involved in Lee Optical's cross-appeal, and
>
> The *third* will involve Section 4, which prohibits "corporate" or "commercial" practice in the field of eye examinations.

Appellants will not unnecessarily burden this Court with citations on the well-recognized rules of law to the effect that legislative acts are presumed to be valid; that their invalidity must be proved beyond a reasonable doubt; that the entire Act is considered in ascertaining the legislative intent; and that the courts are not interested in the wisdom of the legislative enactment, which may be harsh or impolitic, so long as the same has some rational relation to the public health and welfare. Neither will appellants burden this brief with a discussion of that part of the record herein which refers to the *activities of persons*

either supporting or opposing in the Oklahoma Legislature the enactment of House Bill 953, since such activities have absolutely nothing to do with the validity or invalidity of the Act.

However, since respondents contend that the Act is invalid under the Commerce Clause, attention is called to the case of *Philadelphia-Detroit Lines, Inc.*, v. *Simpson* (1940), 37 F.Supp. 314, wherein it is stated:

> "The Supreme Court of the United States has had occasion to consider state statutes, respecting the use of state highways, in two very recent cases, *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 58 S.Ct. 510, 82 L.ed 734, and *Maurer et al.* v. *Hamilton*, 309 U.S. 598, 60 S.Ct. 726, 84 L.ed. 969.
>
> "In the *South Carolina* case (303 U.S. 177, 58 S. Ct. 517, 82 L.ed. 734), Mr. Justice Stone said: '* * * When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. * * * This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. * * *
>
> " 'Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination, we examine the record, not to see whether the

findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis'."

Also, since respondents are asking this Court to issue an order enjoining the Attorney General of Oklahoma, as well as the 77 County Attorneys of said State, from enforcing the provisions of House Bill No. 953, attention is called to the case of *Hawks et al.* v. *Hamill et al.*, 288 U.S. 52, 77 L. Ed. 610, wherein it is stated:

"Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' * * *

"Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials through the rights asserted by the complainants are strictly federal in origin. * * *."

The above holding, which involves decisions of the United States District Court for the Western District of Oklahoma and the United States Court of Appeals of the Tenth Circuit in relation to an Oklahoma law, is cited and quoted with approval in the footnotes of *Burford* v. *Sun Oil Company*, 319 U.S. 315, 87 L. Ed. 1424.

First Proposition

Sections 1 and 2 of the Act, pertaining to eye examinations and the furnishing of corrective eyeglasses to the public, are valid enactments under the Police Power of the State in the interest of public health and welfare.

Sections 1 and 2 of House Bill 953, summarized together, provide that the people of Oklahoma shall receive the best possible visual care; that only licensed physicians and optometrists are permitted to make eye examinations and adapt corrective glasses to the face, except, that an optical supplier or dispensing optician on prescriptive authority of a physician or optometrist may interpret his prescription, grind the lenses therefrom, and duplicate, replace, fit, adapt, and adjust glasses for the patient, and continue thereafter to do such acts on such prescriptive authority; further that the physician or optometrist issuing a prescription *is responsible for the full effect of appliances furnished the patient.*

Differently stated the Act provides that only physicians and optometrists shall make examinations of the human eye for glasses, opticians shall supply glasses to correct defective vision to the public only pursuant to prescriptive authority of the professional practitioner who is fully responsible for the care of the eyes of his patient.

Respondents say this imposes undue limitations on the age-old function of the optician. The Oklahoma Legislature says that the care of the eyes of the public *should be entrusted to, and be the responsibility of* qualified, licensed, professional men. It is not believed that because opticians may have done certain things in the past is material. In

years past, barbers practiced dentistry, but with the progress of science and civilization, dentistry has been eliminated from their functions and properly assigned to the dental profession. Many other such examples could be cited.

The care of the eyes of the public is of great public interest. The public health and welfare are involved. The State, under its police power, may enact legislation regarding visual care and the furnishing of eyeglasses to the public for the purpose of correcting defective vision. In this connection attention is invited to the case of *Sage-Allen Co.* v. *Wheeler* (Conn., 1935), 179 Atl. 195, wherein it is held:

> "It is a matter of common knowledge that where a person suffers from defective vision the use of eyeglasses not correctly adapted to remedy the defect may seriously aggravate it, and, because of the resultant eye strain, may bring about nervous and even physical disorders, with accompanying discomfort and loss of efficiency."

In this connection it will be noted that while Dr. Coston (whose qualifications as an ophthalmologist are set forth on page 90 of the record) testified (R. 104) that "ill fitting glasses will cause *no permanent damage* to the eye," he also testified that such glasses will result in the *loss of efficiency* to the patient and tend in some cases "to *aggravate* a nervous condition." Moreover, Dr. Clay (whose qualifications as an ophthalmologist are set forth on pages 227 and 228 of the record) testified (R. 233, 234) that improperly fitted or adjusted eyeglasses were "likely to cause some discomfort," "reduce the efficiency of the patient,"

"add to the nervous tension of the patient or cause a person to be nervous," and that prolonged use of ill fitting glasses will cause "muscular imbalance" of the eye.

The highest authority in support of the instant proposition is found in the case of *Roschen* v. *Ward, Attorney General of the State of New York*, 279 U.S. 337, 72 L. Ed. 722, decided by this Court in 1929. Said case involves a New York law which makes it unlawful to sell at retail any eyeglasses or lenses for the correction of vision, unless a duly licensed physician or optometrist be in charge of and in personal attendance where such articles are sold. MR. JUSTICE HOLMES delivered the opinion, which affirmed the decision of a Three-judge Federal District Court, presided over by CIRCUIT JUDGE AUGUSTUS N. HAND, upholding said law as a valid enactment under the police power of the State of New York.

If New York can validly restrict the sale of eyeglasses for visual correction unless a physician or optometrist be in charge of and in personal attendance, cannot Oklahoma require that opticians furnish glasses only upon the prescriptive authority of a physician or optometrist? It is interesting to note that the New York law contains a provision that it does not apply to persons selling glasses only on prescription from physicians or optometrists. It is thus apparent that Sections 1 and 2 of the Act involved herein have been enacted pursuant to the clear authority of this Court.

Inasmuch as the decision in the *Roschen* case, *supra*, is short and concise, and since the principles of law an-

nounced therein fully support the validity of the Act involved herein, we quote said decision in full, as follows:

"Mr. Justice Holmes delivered the opinion of the Court:

"These are suits brought by dealers in eye glasses for an injunction prohibiting the enforcement of Chapter 379 of the New York Laws of 1928, which amends the Education Law by inserting two sections, of which the material portion *makes it unlawful to sell at retail in any store or established place of business 'any spectacles, eye glasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and (in) personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business.'* The complainants moved for a preliminary injunction, a statutory court of three judges was convened and after a hearing the injunction was refused and the bills were dismissed on the ground that no cause of action was shown. 29 F.(2) 762.

"The complainants sell only ordinary spectacles with convex spherical lenses, which merely magnify and which it is said can do no harm. The customers select for themselves without being examined and buy glasses for a relatively small sum. It is said that the cost of employing an optometrist would make the complainants' business impossible, and that in the common case of eyes only grown weaker by age the requirement is unreasonable. But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This as it is presented seems to us a perversion of the Act. When the statute requires a physician or optometrist to be in charge of the place of sale and

in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary and, if he thinks it necessary, to make it. We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean. *Moreover, as pointed out below, wherever the requirements of the Act stop there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil.* A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.

"Of course we cannot suppose the Act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done—but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature not for the Courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense."

We also quote briefly from the opinion of the lower court involving the New York law, which was written by CIRCUIT JUDGE AUGUSTUS N. HAND and reported in 29 F.2d 762, inasmuch as such opinion clearly recognizes that the type enactment involved herein has a very substantial relation to public health, safety, and welfare, is not in viola-

tion of the due process clause of the Federal Constitution, and is within the police power of the State:

"(2) The second contention is the one on which complainants really rely. They contend that the New York act violates the due process clause of the Fourteenth Amendment of the Federal Constitution, because it has no substantial relation to the public health, safety, and welfare, and therefore is not within the unclassified residue of legislative power of the state known as the police power.

"But can it be justly said that an optometrist, who is 'in charge of and (in) personal attendance at the place where' spectacles 'are sold,' would not substantially remedy the existing evils of haphazard selection of eyeglasses? Can it be reasonably argued that the licensing of physicians is illegal, because no law requires a sick man to employ a doctor? Or shall it be said that laws for fire escapes or rear vision mirrors on trucks, or life preservers and lifeboats on vessels, are unconstitutional, because they contain no directions that they be used by the tenants, drivers, or passengers? *To render an optometrist available wherever eyeglasses are sold is certainly a long step toward correcting existing evils.*

* * * * * * * *

"*If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable, so that the customers in the end would not purchase it, but would have their eyes carefully tested and their glasses made according to special prescription, it cannot be said that the result might not on the whole be desirable.* At any rate, whatever the result to the business of selling a standardized product, *the correction of certain manifest evils was within the legislative power, and the means adopted*

seems to have been reasonably calculated to promote the public health and safety.

* * * * * * * *

"A similar statute to the one under consideration has been adopted in Massachusetts.

"The New York Legislature was not obliged, if it legislated at all, *to require an examination of the customer by a licensed optometrist before permitting a sale of eyeglasses to him. Doubtless it could have done this.* But it might adopt a halfway measure, safeguarding him by in effect placing sales in charge of a man of scientific training, and rendering the services of the latter naturally available. This it did, and this was we think constitutional."

The problem before this Court is not novel. Other states have passed similar laws and they have been upheld by their highest courts. For example, Massachusetts passed a law making it unlawful for anyone not authorized to practice optometry to sell or attempt to sell eyeglasses or lenses for the purpose of correcting human vision, *with the further provision that such law did not apply to physicians or to persons who sell eyeglasses or lenses on prescription from optometrists or physicians.* There is no basic difference in the Massachusetts law and the law involved herein. They both require that opticians furnish glasses to the public only on prescriptive authority of the professional practitioner. The Supreme Court of Massachusetts, in *Commonwealth* v. *Kresge Co.* (Mass., 1929), 166 N.E. 558, upheld the validity of their law, saying that the legislative intent in enacting the same was to *preserve and promote* the public health, and was a valid exercise of the

police power. We cite below several of the pertinent statements contained in said case, as follows:

"The indictment is based upon G. L. c. 112 § 73, as amended by St. 1926, c. 321, §2. Its pertinent words are '*Whoever, not being lawfully authorized to practice optometry, practices or attempts to practice optometry, or sells or attempts to sell spectacles, eye glasses or lenses for the purpose of correcting defective vision,* * * * or violates any other provision of sections sixty-six to seventy-three, inclusive, shall be punished.' * * *

"It is further provided by G. L. c. 112 § 73, as amended by St. 1926, c. 321, § 3: '*The seven preceding sections shall not apply to physicians and surgeons lawfully entitled to practice medicine in the commonwealth, or to persons who neither practice nor profess to practice optometry, but who sell spectacles, eyeglasses or lenses, either on prescription from such physicians or surgeons, or from optometrists authorized to practice in the commonwealth,* or as merchandise from permanently located and established places of business when not sold for the purpose of correcting defective vision.'

* * * * * * * *

"*Every rational presumption will be indulged in favor of the validity of an act of the legislative department of government and the court will not refuse enforcement unless its conflict with the Constitution is established beyond reasonable doubt.* Where practicable, a statute must be so interpreted as not to render it contrary to the terms of the Constitution and also to avoid grave doubts on that score.

* * * * * * * *

"(4) *The main intent of the Legislature in enacting the statute here assailed was to preserve and promote the public health.* The original statute on which the

sections already quoted were founded were St. 1921, c. 700. That statute was declared constitutional in *Commonwealth* v. *Houtenbrink*, 235 Mass. 320, 126 N.E. 669. *The ground of that decision was that the statute was designed and had a rational tendency to promote and preserve the public health and was a valid exercise of the police power.*

* * * * * * * * *

"It is plain that sections 66 to 72 of G. L. c. 112, both inclusive, *were intended in the main to regulate and to govern the treatment of the individual with eye glasses for alleviation of the consequences of impaired vision.* That is apparent both from a general survey of all the sections as a group and from a detailed examination of each section by itself. *The protection of the individual from the effects of treatment for eyes by the ignorant and unskilled was the end sought to be accomplished.*

* * * * * * * *

"They have no application to sales at either wholesale or retail of colored eye glasses or of spectacles made of plain glass, not designed to correct defects in vision but to protect the eye from dust, wind, storm, the glare of the sun, or kindred exposure. Manifestly they have no relevancy to sales of telescopes or microscopes or of lenses therefor.

* * * * * * * *

"(5) It seems to us not open to serious debate that it is within legislative competence to determine that scientific and trained adjustment of eyeglasses and of the lenses of which they are made, to the particular organs of vision of each individual, will be likely to effect a more complete and healthful correction of poor eyesight than the untrained and unaided selection by the customer himself from a mass of eyeglasses. We do not understand that that argument has

been urged in behalf of the defendant. The chief contention is that the statute as now framed by the amendments of 1926 constitutes an unwarrantable interference with the private business of the defendant. *As we interpret the statute, it is directed to the untrained and unscientific, treatment of the eye of the individual customer. The defendant cannot complain that its business is injured by the exercise of the police power for the benefit of the public health.* *Lawrence* v. *Board of Registration in Medicine*, 239 Mass. 424, 132 N. E. 174; *Graves* v. *Minnesota*, 272 U. S. 425, 47 S. Ct. 122, 71 L. Ed. 331.

* * * * * * * *

"The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution.

* * * * * * * *

"The police power may be exerted in the form of State legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

* * * * * * * *

"*It seems to us that the statute here in question conforms to every requirement for validity thus laid down and is not obnoxious to any one of them.* The defendant is undertaking to invade under the guise of private mercantile business a field rightly sequestered, by the Legislative in the interests of the public

health to those possessing special skill and training in a specified department of treatment of human ills.

* * * * * * * *

"*The sections of the statute here under review appear to us to be a reasonable effort to accomplish an improvement in the general health of the community with respect to organs of vision. They do not violate any provision of the Fourteenth Amendment of the Federal Constitution.* They fall within the protecting authority of *McNaughton* v. *Johnson,* 242 U. S. 344, 37 S. Ct. 178, 61 L. Ed. 352, Ann. Cas. 1917B, 801, and *Commonwealth* v. *Houtenbrink,* 235 Mass. 320, 126 N.E. 669, and the cases there collected. To the same general effect is *D. S. Kresge Co.* v. *Ottinger* (D.C.), 29 F.(2d) 762, affirmed by the Supreme Court of the United States, *subnomine S. S. Kresge Co.* v. *Ward,* 49 S. Ct. 336, 73 L. Ed. —, on April 22, 1929."

Ritholz v. *Commonwealth* (Va., 1945), 35 S.E.2d 210, is another very pertinent case which follows the *Roschen* case, *supra,* and applies the principles therein announced to an advertising prohibition law in the field of selling eyeglasses. This case also points out that the Act does not constitute class legislation since the furnishing of eyeglasses affects the public health and is a matter within the police power of the state. If the public health is involved the objection of class legislation is not available. The cases relied on by respondents regarding class legislation concern accountants, drain layers, and other pursuits *which have no relation to the public health.* Pertinent portions of the above case are as follows:

"The better reasoned cases hold that restrictions and regulations of the sale of eyeglasses are measures directed to the prevention of substantial harm to the

public health and are within the exercise of the police power of the State.

"In *Roschen* v. *Ward*, 279 U. S. 337, 49 S. Ct., 336, 73 L. Ed. 722, a statute was held constitutional which forbade the sale of eyeglasses or lenses unless a licensed physician or optometrist was in charge and in attendance at the place where they were sold. The constitutionality of the act was upheld on the ground that the State had an interest in seeing that the eyesight of its citizens would not be impaired by the use of eyeglasses or lenses unskillfully selected even by themselves. *If the statute had prohibited the sale of eyeglasses and lenses as merchandise, such a provision would be upheld*, for, as Mr. Justice Holmes said, 'A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.'

"'*The Legislature evidently was not prepared to prohibit the sale of eye glasses and lenses as merchandise, to be selected by the buyer. But it was prepared to discourage it, by eliminating the temptation to and pressure upon customers that result from the assurance that no more than a named price will be charged, or that the price is less than competitors ask.* As in *Roschen* v. *Ward, supra*, that shorter step is consistent with the Constitution. It is not unlike the prohibition of the sale of drugs, or medicinal compounds by itinerant vendors, sustained in *Baccus* v. *(State of) Louisiana*, 232 U. S. 334, 34 S. Ct. 439, 58 L.Ed. 627.' *Commonwealth* v. *Ferris, supra.*

"*We cannot say that this particular legislative policy of regulating and restricting the advertisement of prices and the sale of spectacles and eyeglasses as merchandise is so arbitrary or unreasonable as to con-*

travene the proper exercise of the police power of the Commonwealth.

"(22) The substance of respondents' contention that the optometry statutes violate the provisions of the Federal Constitution is based upon their conclusion that such statutes are class legislation.

"Mr. Chief Justice Hughes, in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1096, addressing his remarks to the constitutionality of statutes regulating the practice of dentistry, used this language: 'We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. *The legislature was not dealing with traders in commodities, but with the vital interest of public health* * * *.' *Furnishing glasses affects the public health as much as furnishing artificial teeth.* See *Ritholz* v. *Johnson supra; Ritholz* v. *Arkansas State Board of Optometrists*, 206 Ark. 671, 177 S. W. 2d 410, 411; *Commonwealth* v. *Ferris, supra.*"

The case of *City of Springfield* v. *Hurst* (Ohio, 1944), 56 N.E.2d 185, contains the following pertinent statement in holding that the ordinance involved (prohibiting advertising) had a reasonable relation to the health and general welfare and was a valid exercise of the police power:

"*The sale of eyeglasses by a retail vendor may be regulated if not prohibited altogether.* For instance, statutes which respectively prohibit (a) the sale of eyeglasses unless fitted by a competent person (*D. S. Kresge* v. *Ottinger, Atty. Gen.*, D.C., 29 F.2d 762), (b) a retail sale of eyeglasses unless a licensed physician-optometrist is present (*Roschen* v. *Ward, Atty. Gen.*, 279 U.S. 337, 49 S. Ct. 336, 73 L. Ed. 722), and (c) anyone not a licensed optometrist from selling spectacles,

eyeglasses or lenses, for the purpose of correcting defective vision' (*Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 150, 166 N.E. 558, 559) have been held constitutional."

This case is clear authority that if the Legislature so desired it might prohibit altogether the sale of eyeglasses by an optician and insist that they be dispensed only by professional practitioners in the same manner that dental appliances are dispensed. The Oklahoma Legislature has not seen fit to go that far and apparently believes that the public health and welfare will be adequately protected by permitting opticians to vend glasses to the public if the prescription of the responsible professional practitioner therefor is at hand.

We wish to emphasize that the Act involved herein does not eliminate the dispensing optician. It merely requires that he perform his services under the prescriptive authority of a professional practitioner who is responsible for the eye care of his patient. This is the precise manner in which the ethical optician operates and prefers to operate. Both the majority (R. 45) and partial dissenting (R. 63, 64) opinions of the lower court have erroneously concluded that one with corrective eyeglasses who desires a new frame or a duplicated lens must first return to the ophthalmologist or optometrist who previously examined him. This is not so by any language of the Act or by contemplated practice. He may return to his optician who has his prescription on file. He may have his prescription in his personal possession and can deliver the same to any optician of his choice. He may call on an optician who does not have his prescription and the optician may obtain the

prescription either from an optician having the same or the examiner who prescribed it. By any of these procedures, the wearer of corrective eyeglasses is assured of having his glasses made and furnished from and in accordance with the professional prescription and all of its directions and thus eliminate the several dangers of getting improperly fitted eyeglasses for one or more of the eleven reasons hereinafter set forth. The property rights of the dispensing optician are not oppressively taken or disturbed. In the interest of better vision and proper fitting, corrective eyeglasses for the public, and the public health and welfare in general, the optician is regulated so as to require that he have before him for guidance the professional prescription involved. This is much like the manner in which the pharmacist or dental technician is required to operate.

Since the federal injunction was entered in 1950 (*United States of America* v. *American Optical Company et al.*, Civil Action 46 C 1333, in the United States District Court for the Northern District of Illinois) against the major optical companies, the majority of dispensing opticians, like the two opticians testifying herein, do not even attempt to grind a lens, which is the age-old function of the true optician (Hill, R. 135; Barber, R. 168-169). Evils and abuses became evident as commercialism attempted to take full control and the gullibility of the public was exploited.

The evidence herein of all the doctors indicates that defective vision is a bodily defect or ill, should receive professional attention and that the professional man should

be fully responsible for the eye care of his patient (Dr. Coston, R. 102; Dr. Clay, R. 229, 230; Dr. Stackpole, R. 247; Dr. Culler, R. 273; Dr. Braley, R. 344, 345, 353, 354, and Dr. Cordes, R. 292, 293, 294). Further that only physicians and optometrists are qualified to make eye examinations (Dr. Coston, R. 107, 108; Mr. Barber, R. 169; Dr. Clay, R. 230; Dr. Culler, R. 271; Dr. Braley, R. 352; Dr. Cordes, R. 283), and that the initial pair of glasses to correct defective vision must be supplied by the dispensing optician from the prescription of a professional practitioner for opticians cannot make eye examinations (Dr. Coston, R. 102, 103; Mr. Barber, R. 169; Dr. Clay, R. 231; Dr. Culler, R. 272; Dr. Braley, R. 352).

Thus the only possible question relating to Section 2 of the Act is whether the dispensing optician should have a prescription in his shop from which duplications of eyeglasses must be made, or should he be permitted to duplicate from the eyeglasses alone and then fit the same to the face without any prescriptive authority or information at hand. The Oklahoma Legislature, after extensive hearings with both views well represented, decided that the public health and welfare in the field of visual care would be better served and protected by the former procedure and in effect decided that the furnishing of glasses to the public should be under professional supervision and responsibility in the same manner that prescribed drugs are dispensed, and false teeth and other dentures are furnished to the patient. The ethical optician is not particularly affected by this decision of the Legislature, but the commercialist optician that preys on the public finds his opportunities curtailed to his financial detriment.

A review of all of the medical evidence in this case reveals that there are at least eleven good and valid reasons why the public is protected and better served in the field of eye care to have duplications of eyeglasses made pursuant to information contained in the prescription, rather than without the same. We enumerate these reasons below and indicate following each, transcript or record references directly or indirectly supporting the same. Doubtless the Legislature, in its consideration of the question, recognized the merit of these reasons and determined that they constituted a rational and reasonable basis for the requirement enacted which we respectfully urge this Court not to disturb:

1. Sometimes prescriptions need to and do contain data regarding the desired distance of the lens from the eyes, and the angle of the lens to the eyes that should be followed in adapting glasses to the patient and which cannot be ascertained from the glasses alone (Dr. Coston, R. 92, 103, 104; Dr. Clay, R. 228, 237; Dr. Benedict, R. 312, 313).

2. Post-operative prescriptions contain necessary information for adapting glasses to the patient which cannot be ascertained from the glasses alone (Dr. Braley, R. 339).

3. Duplication from prescription rather than glasses alone eliminates error that may result from lensometer reading (Dr. Coston, R. 105, 106, 107; Mr. Barber, R. 169, 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

4. Prescription will show correct axis of lens whereas lens may have rotated in the frame and resulting lensometer reading would not conform to doctor's

prescription for the axis (Mr. Hill, R. 138, 139; Mr. Barber, R. 165, 166; Dr. Clay, R. 236, 237).

5. Prescription will show correct optical center of lens whereas lens may have rotated in frame and resulting lensometer reading would not conform to doctor's prescription for the optical center (Dr. Clay, R. 236, 237).

6. Optician may undertake to duplicate from an inadequate fragment and furnish incorrect lens to patient, whereas prescription would give correct data for grinding and adapting (Dr. Coston, R. 106; Mr. Hill, R. 142; Mr. Barber, R. 165; Dr. Stackpole, R. 251; Dr. Braley, R. 348).

7. Prescription will indicate correct date of last eye examination and may suggest need for re-examination due to laspe of time (Dr. Coston, R. 109).

8. Lensometer can get out of adjustment, resulting in incorrect reading with patient being supplied with incorrect lens (Mr. Barber, R. 170; Dr. Clay, R. 235; Dr. Stackpole, R. 250, 251).

9. The element of human error in making lensometer reading is always present and may cause incorrect lens to be furnished the patient. This was clearly demonstrated in the courtroom by the respondents' own witness, Hill, a dispensing optician, who misread the axis of the right lens of Mr. Duvall's glasses on the lensometer by five degrees! (Mr. Hill, R. 125, 129, 140, 141; Mr. Barber, R. 169, 170; Dr. Clay, R. 236; Dr. Stackpole, R. 250, 251).

10. Repeated duplications from glasses alone, each within acceptable tolerance, could result in lens being furnished the patient which fails to correspond to doctor's original prescription (Dr. Coston, R. 106; Mr. Hill, R. 139; Mr. Barber, R. 170).

11. Professional men prefer duplications from prescriptions over duplications from glasses alone (Dr. Coston, R. 106, 107; Dr. Clay, R. 235; Dr. Stackpole, R. 250).

The majority opinion admits that the optician should operate subject to qualifying standards when it states that the Oklahoma Legislature has been guilty of undue oppression in failing to set up qualifying standards for them (R. 49). The Oklahoma Legislature, from its consideration of the problem, has decided that the optician is adequately regulated and the public adequately protected by the provisions of House Bill 953 wherein the optician is required to have the professional prescription on hand and the professional man is made responsible for appliances furnished to his patients pursuant to his prescription. The solution of this problem and the method employed is for the Oklahoma Legislature and not the court.

On the duplication question, the respondents relied on the North Carolina case of *Palmer et al.* v. *Smith* (N. C., 1948), 51 S.E.2d 8. This case is distinguished from the situation before this Court in that such case construed the North Carolina optometry law and simply holds that an optician in duplicating a lens is not practicing optometry under the provisions of the optometry law of that state. The Act of the Oklahoma Legislature being considered by this Court is not an optometry law. It does not provide that one duplicating a lens shall be deemed to be practicing optometry. The Act of the Oklahoma Legislature is a new and separate law governing the sale of corrective optical goods to the public, and is designed to protect the public and promote

and preserve the public health and welfare in the field of visual care, *regardless of the person, trade or profession involved in selling eyeglasses.* The North Carolina case says:

> "The sole question for determination on this appeal is whether or not an optical mechanic is practicing optometry when he replaces or duplicates an ophthalmic lense or replaces or duplicates the frame or mounting for such lense."

and further says:

> "It must be conceded that the statute under consideration was intended to regulate the practice of optometry and not the optical trade."

The Act of the Oklahoma Legislature under consideration does not provide that the act of duplicating a lens shall be deemed to be the practice of optometry. Said Act was not intended to regulate the practice of optometry alone and not the optical trade. Oklahoma has a separate optometry law and a separate medical practice act. The Act of the Oklahoma Legislature under consideration clearly was intended to regulate the furnishing of eyeglasses for visual correction to the public by any person, regardless of trade or profession. Indeed if the public is to be afforded proper protection and is to receive the best possible visual care, the whole field must be covered.

Respondents also rely on the case of *Kindy Opticians, Inc., v. Michigan State Board of Examiners* (Mich., 1939), 291 Mich. 152, 289 N.W. 112, which likewise is distinguished in that the Michigan Act considered therein related to optometrists only and not to opticians. The decision so holds

and turns on this point, as is clearly shown by the following extracts therefrom:

> *"The statute in question provides that it shall be unlawful for 'any person to advertise glasses or lenses,* frames or their supporting accessories, with or without frame or mounting at a price, with or without examination of eyes or professional services, or at a price with such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import; or to offer any gift, premium, or discount in conjunction with the practice of optometry:'.
>
> *"Although plaintiff contended that subdivision (i)* of Sec. 8 of Act No. 223, Pub. Acts 1937 (Stat. Ann. Sup. § 14,648), *was unconstitutional, it abandoned this claim upon appeal, but did insist that said amendment was not within the title of the act, and, therefore, not applicable to plaintiff who was engaged in the business of a dispensing optician and not in the practice of optometry.*
>
> "(3) *The record is convincing that the business in which the plaintiff was engaged was that of a dispensing optician. The title of the act relates to optometrists only, and not to opticians.* We must, therefore, hold that plaintiff was entitled to the relief sought, namely, a declaration by the court that its business, that of a dispensing optician, cannot be interfered with by the defendants, or any of them, while it is engaged in the lawful prosecution of its business."

Again the Act of the Oklahoma Legislature under consideration does not relate to optometrists only but relates to the sale of corrective optical goods to the public by any and all persons, trades, and professions. We, therefore, assert that the *Palmer* case and the *Kindy* case, *supra*, both

dealt with optometry laws only and simply held that such laws could not be extended beyond their titles and scope to cover opticians. The Act under consideration is quite different in title and scope and the *Palmer* and *Kindy* cases are inapplicable.

To conclude and summarize the foregoing proposition we state that under the authority of *Roschen* v. *Ward, supra,* the Oklahoma Legislature under its police power, in the interest of public health and welfare and to assure the best possible visual care for the people of Oklahoma, can regulate the entire field of visual care and in doing so regulate the sale of corrective optical goods and eyeglasses to the public; that the cases relied on by respondents are inapplicable in that they involve optometry laws only which by virtue of their titles and scope were not extended by the courts to include the activities of the opticians, *whereas,* the Oklahoma Act governs all persons, trades or professions that may be involved in the sale of corrective optical goods or eyeglasses to the people of Oklahoma.

Second Proposition

The provisions of Section 3, prohibiting advertising, are valid in the interest of public health and welfare under the Police Power of the State.

Prohibitions against advertising in the field of visual care are not new to the law. In fact, 28 states* have adopted

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* Arkansas, California, Florida, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

laws of this type and they are universally upheld by the highest courts of the land.

To our knowledge, this Court has not had occasion to pass on a prohibitory law against advertising in the field of selling eyeglasses to the public, but has passed on a law against advertising in the dentistry field in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L.Ed. 1086. We believe that the import of this decision applies with equal force to the advertising of eyeglasses. The *Semler* case involved an Oregon statute prohibiting:

> "* * * advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head; employing or making use of advertising solicitors or free publicity press agents; or advertising any free dental work, or free examination; or advertising to guarantee any dental service, or to perform any dental operation painlessly."

In affirming the Supreme Court of Oregon which upheld the validity of the above prohibition against advertising, this Court in an opinion delivered by MR. CHIEF JUSTICE HUGHES said:

> "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their

profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The Legislature was aiming at * * * bait advertising. 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed dental work" was, as a general rule, the practice of the charlatan and the quack to entice the public.'

"*We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place.* The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. *And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.* What is, generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.

"It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the Legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The Legislature was entitled to consider

> the general effect of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement (*Booth* v. *Illinois*, 184 U.S. 425, 429; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201; *Hebe Co.* v. *Shaw*, 248 U.S. 207, 303; *Pierce Oil Corp'n* v. *Hope*, 248 U.S. 498, 500; *Euclid* v. *Ambler Co.* 272 U.S. 565, 388, 389)."

There is no decision of either of the appellate courts of Oklahoma passing on the validity of a state law relating to or regulating "visual care," or "the sale of *optical* goods and devices." However, the Supreme Court of Oklahoma in *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P.2d 427 (cited with approval by the Criminal Court of Appeals of Oklahoma in *Curtis* v. *State*, 78 Okla. Cr. 282, 147 P.2d 465), upheld the validity of a statute of Oklahoma relating to *dental care* and prohibiting the *sale of dentures to the public* by advertising dental laboratories (same, like optical laboratories or companies, not being regulated or licensed by state law). In this connection it will be noted that the stipulation of facts in the *Curtis* case, as quoted by the Court, *reveals a plan of business almost identical to that of Lee Optical and Douglas Optical herein*, said stipulation being in part as follows:

> "That the United Dental Laboratory, located at 402 South Cheyenne, Tulsa, Oklahoma, is owned and operated by the defendant, Norman V. Curtis, who is not a licensed dentist. That on several occasions persons have gone to the defendant's laboratory for the purpose of having dental plates made. *That said persons went to the laboratory as a result of having seen an advertisement in the local papers*, stating that dental plates

were made and sold by the above defendant, and for other reasons; that upon inquiring of the defendant as to said plates they were told that he would be happy to make the plates for them but it would be necessary for them to see a licensed dentist for the purpose of having the impressions made, from which the plates were to be made, and defendant further suggested *that there was a very good dentist just down the hall, Dr. Moore*, who is and was at all times mentioned in this stipulation a regularly licensed dentist under the laws of the State of Oklahoma. That said persons did contact Dr. Moore and that the impressions were made. *Thereafter, the impressions were taken to the laboratory of the defendant and the plates were made therefrom.* That a contract for the sale of the plates was made by the defendant and the customer; that a separate contract was made by the dentist and the customer for the making of the impressions and that the customer separately paid the dentist and the laboratory for their respective services."

In condemning said plan of business the Supreme Court of Oklahoma held:

"* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, *and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them.* An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, *was engaged in the business of supplying substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory* which patently were designed to

induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth. This constituted a direct violation of the provisions of the statute quoted, *supra*, against a person holding himself out, or employing methods in any way representing himself as being engaged in the practice of dentistry. *That the states may enact legislation of this type for the protection of citizens is well settled.* See *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L.Ed. 1086."

The above decision of the Supreme Court of Oklahoma, as well as the *Semler* case cited therein (same being heretofore discussed), are in harmony with the decision of the Supreme Court of Oklahoma in the case of *State Bar* v. *Retail Credit Association*, 170 Okla. 246, 37 P.2d 954, wherein said Court, in upholding a writ of injunction against the Retail Credit Association of Oklahoma City *for illegally practicing law in this State*, to-wit: for operating a collection agency therein, cited the case of *In re Co-operative Law Company* (N. Y.), 92 N.E. 15, stating that said case "dealt with the evil effects of the unauthorized practice of law by corporations," and quoted with approval from said case, as follows:

"The degradation of the bar is an injury to the State."

In the field of furnishing eyeglasses to the public, a number of decisions have been handed down by the state supreme courts pertaining to advertising prohibitions. The most recent is from the Supreme Court of Louisiana in the case of *State of Louisiana* v. *Rones* (June, 1953), 67 So.2d

99. The Louisiana statutes prohibiting advertising provides:

> *"No person shall:*
>
> * * * * * * * *
>
> *"(9) Advertise as free or for a price any of the following: The examination, or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses or the frame or fittings thereof."*

and

> *"No retail dealer shall directly or indirectly, advertise through any medium the sale of glasses, or peddle, solicit, sell, or offer for sale glasses from door to door, or house to house, or away from his permanent established place of business."*

In upholding the validity of the Louisiana statute, as one designed to protect the public, the Supreme Court of Louisiana stated:

> "* * * the second paragraph of the section makes it manifestly clear that no retail dealer shall advertise."

The Oklahoma law is no broader than the Louisiana law. Both prohibit retailers and professional men alike from advertising, through any medium, the sale of eyeglasses to the public. They are identical in import.

The opinion from the Supreme Court of Louisiana further says:

> "The second ground urged by appellant in his motion to quash is that *the statute under which he was charged, insofar as it restricts advertising by retail*

dealers, is unconstitutional because it violates the due process provision of the Fourteenth Amendment of the United States Constitution and of Article 1, Section 2, of the Louisiana Constitution, and contravenes the guaranty of freedom of speech in Article 1, Section 3, of the Louisiana Constitution.

* * * * * * * *

"The question presented by this case is whether a statute which prohibits *any person, thereby including a retail dealer,* from advertising the sale of glasses, lenses, etc., for a price or without cost is a reasonable regulation within the police power of the State and therefore constitutional.

"No citation of authority is necessary that the constitutionality of every statute is presumed, and that it is the duty of the court to uphold the statute wherever possible. For this purpose every consideration of public need and public policy upon which the Legislature could rationally have based such legislation should be weighed by the court, and, if the statute is not clearly arbitrary, unreasonable, and capricious, it should be upheld as constitutional.

"The courts of other states have had occasion to consider the validity of statutes regulating the advertising by *retail dealers of eyeglasses.* In some of the cases the courts have concluded that such regulation was reasonable and proper and constitutional. * * * *We are in accord with the views of those upholding such statutes.* These courts have decided that the statutes are a reasonable exercise of the police power because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the

> increase in sales and the incidental harm that comes from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

This very recent expression from one of the highest courts in the land should indeed be persuasive that laws prohibiting advertising *by all persons* in connection with the sale of eyeglasses to the public are for the protection of the public and constitute a valid exercise of the police power. Protection *must* be afforded the people from commercial interests invading the state who draw people into their places of business by neon signs, newspaper advertisements, radio programs and window displays, only to send them upstairs to an osteopath who is neither qualified nor legally permitted to make an eye examination for glasses in the State of Oklahoma and who sends them back downstairs for their glasses (R. 212, 213). It would indeed be interesting to know if anyone ever failed to get a prescription for glasses at the hands of this osteopath—a former salaried employee of the commercial organization responsible for bringing him to this State (R. 214).

Thus, one of the most important evils sought to be cured by the advertising prohibition is that with the aid of an extensive advertising program to draw in the public, an optician or commercial enterprise can engage in the practice of ophthalmology or optometry by an unholy alliance such as now exists between Lee Optical and Dr. Conti and Douglas Optical and Dr. Rips. Without an extensive advertising program, such alliances would fail, for

neither Dr. Conti nor Dr. Rips could attract sufficient patients to support Lee Optical or Douglas Optical, who admittedly get practically all of their prescriptions from such doctors (R. 214), and Dr. Rips admits (R. 214) that he gets practically all of his patients from Douglas Optical.

In this connection it is clear that if respondents' plan of business is legal, they can, acting in conjunction with some licensed optometrist or ophthalmologist and by the use of an extensive and alluring advertising program, *practically corner the professions of optometry and ophthalmology in the city or territory where they advertise*, since licensed optometrists or ophthalmologists cannot engage in a counter advertising program. The logical, final effect of such a plan of business is either to destroy the professions of optometrists or ophthalmologists or to make them subservient to advertising optical laboratories or companies; *that is*, either to make licensed optometrists and ophthalmologists the employees of advertising optical laboratories or companies or dependent for their livelihood upon such customers they may choose to send to them.

The fact that 28 states have laws prohibiting advertising in the field of visual care is evidence that these commercial interests (and perhaps unethical professional men) have imposed their abusive practices upon the people of many states. In Ohio we find the recent case of *City of Springfield* v. *Hurst*, *supra*. This case involves an ordinance of the City of Springfield, described as follows in the syllabus of the Court:

> "A provision in an ordinance of a municipal corporation, which ordains that 'no person, partnership, cor-

poration, or agent or employee therein engaged in or connected with the sale of eyeglasses, ophthalmic lenses, eyeglass frames and mountings, shall include in any advertisement by newspaper, radio, display, or otherwise, any statement advertising the price of lenses, or of complete eyeglasses, including lenses, either with or without professional services or credit terms, installment payments or price plans,' is a reasonable and valid exercise of the police power and is not violative of the federal or state Constitution."

In this case the defendant contended that the ordinance violated the Fourteenth Amendment to the Federal Constitution. Springfield contended that the ordinance had a reasonable relation to the health and general welfare of the public and was a valid exercise of the police power. The Supreme Court of Ohio said:

> *"The sale of eyeglasses by a retail vendor may be regulated if not prohibited altogether."*

and then after quoting this Court in the *Semler* case, *supra*, to the effect that:

> "* * * (b) bait advertising may be defined as a method used by unethical professional men and others to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them."

continues further with the statement:

> *"It cannot well be questioned that the rule which applies to the dentist would apply to the optometrist. But would it not also apply to the optician?*
>
> "The dentist takes impressions and makes false teeth to fit the mouth. The optometrist measures the eye and, if he chooses to sell complete eyeglasses, grinds the lenses or has them ground and then in-

stalls them in mountings to fit the eyes and face. Then the optician divides work with the optometrist in that the optician sells complete eyeglasses with lenses which he grinds or has ground according to the prescription furnished by the optometrist. In a certain respect, there is a marked similarity between the scope of the work of the dentist and the scope of the combined work of the optometrist and optician. The dentist produces fitted teeth, the optometrist and optician produce fitted eyeglasses complete. But why should legislation against bait advertising as to the price of lenses or complete eyeglasses be held valid as to the optometrist and not as to the optician? Is the prescription more important in relation to health than the grinding according to prescription? Lenses must be prepared by those trained in the grinding. Quality of material and skill in workmanship are prime essentials in producing the finished lenses. Poor quality and poor grinding will naturally result from the desire to sell spectacles in quantity at low advertised price, with the purpose of underselling the optometrist and other opticians who do not indulge in such advertising. *Poor and improperly ground lenses will impair the eyesight of the person to whom they are sold as properly fitted. Thus, legislation prohibiting such bait advertising has a real and substantial relationship to the public health whatever vendor employs the injurious method. The result of forbidding the professional practitioner to resort to such advertising and permitting the optician (or even the retail vendor) to indulge in the harmful practice does not eradicate the evil. The whole field must be covered if protection is to be afforded the public.*"

How true it is that the whole field of visual care, including the optician, must be covered if protection is to be afforded the public. Our ethical opticians, working with

ophthalmologists, have not and will not resort to the abusive practices of respondents who use an osteopath and other imports such as the respondent Rips. The whole field must be covered in order to protect the public and this is what the Oklahoma Legislature has done.

The majority opinion would uphold the advertising prohibition except refuse to apply the same to frames and mountings. We cannot improve on the language of Circuit Judge Murrah in his partial dissent (R. 64) when he says with reference to this exception:

> "By this method one so engaged may circumvent the very evil to which the legislation is aimed, namely, prohibiting dishonest and dangerous practices in the sale of optical goods and devices."

and when he says:

> "But I entertain no doubt of the power of the Legislature to regulate the advertising of empty frames, mountings and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care."

In Massachusetts we find the case of *Commonwealth v. Ferris* (Mass., 1940), 25 N.E.2d 378, which concerns the Massachusetts law prohibiting advertising in the field of visual care. This opinion first says:

> "Where the public are not cautious or watchful in their buying habits and are likely to be misled, the Legislature may require not only the absence of active deception but also *affirmative measures* to prevent misunderstanding."

and then, regarding laws prohibiting advertising, says:

"They may be sustained as measures in the interest of the public health, an unquestioned ground for the exercise of the police power. In *Roschen* v. *Ward*, 279 U.S. 337, 49 S. Ct. 336, 73 L.Ed. 722, a statute was held constitutional which forbade the sale of eyeglasses or lenses unless a licensed physician or optometrist should be in charge of and in attendance at the place in the store where they are sold. *The plain implication of the decision is that the State has an interest in seeing that the eyesight of its citizens is not impaired by the use of eyeglasses or lenses unskillfully selected, even by themselves; and that, as the court below had declared (D. S. Kresge Co.* v. *Ottinger*, D. C., 29 F2d 762, 764), *the sale of eyeglasses and lenses might be prohibited unless they should be selected and fitted by competent persons."*

This opinion then concluded by upholding the validity of the Massachusetts law and stated:

"There may well be reasons of public policy requiring the prohibition of advertising to sell merchandise, the actual sale of which is not forbidden. Commonwealth v. *Clapp*, 5 Pick. 41; *Commonwealth* v. *Nutting*, 175 Mass. 154, 55 N.E. 895, 73 Am.St.Rep. 483; affirmed *Nutting* v. *Massachusetts*, 183 U.S. 553, 22 S.Ct. 238, 46 L.Ed. 324; *Delamater* v. *South Dakota*, 205 U.S. 93, 27 S.Ct. 447, 51 L.Ed. 724, 10 Ann.Cas. 733; *Bothwell* v. *Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277; *Packer Corp.* v. *Utah*, 285 U.S. 104, 52 S. Ct. 273, 76 L.Ed. 643, 79 A.L.R. 546; *State* v. *Hollinshead*, 77 Or. 473, 151 P. 710; *State* v. *J. P. Bass Publishing Co.* 104 Me. 288, 71 A. 894, 20 L.R.A., N.S., 495. *The following cases tend to support our conclusion that these prohibitions are constitutional in their application to the advertising of the sale of*

lenses and complete eyeglasses, Seifert v. *Bihl Optical Co.*, 276 Mich. 692, 698, 268 N.W. 784; *New Jersey State Board of Optometrists* v. *S. S. Kresge Co.*, 113 N.J.L. 287, 294, 174 A. 353; *State* v. *Goodman*, Minn., 288 N.W. 157."

The case of *Klein* v. *Department of Registration and Education* (Ill., 1952), 105 N.E.2d 758, is a recent and very persuasive opinion concerning an Illinois law regulating the activities of optometrists in relation to advertising. This law first requires optometrists to keep records on prescriptions issued for a period of three years, *and then prohibits neon sign advertising, telephone directory listing dissimilar in size to those used by other practitioners of the healing arts, and window display advertising of eyeglasses and frames.* All the provisions of this law were upheld by the Supreme Court of Illinois in the interest of public health and welfare and as being reasonably calculated to eliminate the injurious effects of uninhibited advertising. We quote from the body of this opinion as follows:

"While at first blush it would seem that sections 13(k) (neon advertising), (l) (telephone directory advertising) and (m) (window display advertising) appear to be an arbitrary interference with the right of one to practice optometry, such thoughts are dispelled when the relative aspects of public health and welfare are considered. As pointed out in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 572, 79 L.Ed. 1086, the legislature *is not dealing with traders in commodities but with the vital interest of public health and the treatment of bodily ills.* The public is concerned not only with the maintenance of standards which will insure comp-

tency in the individual practitioner, but protection against those 'who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.' In addition, the community is concerned in providing safeguards not only against deception, but against practices which tend to demoralize the business or profession by forcing its members into unseeming rivalry, which would tend to enlarge the opportunity of the least scrupulous. Advertising by large display, glaring and lighted signs or by depicting a part of the human body, and other forms of advertising, have been held to produce such undesired results and accompanying detriment to the public welfare. *Winberry* v. *Hallihan*, 361 Ill. 121, 197 N.E. 552. In the case last cited and in the *Semler* case, it was held that the legislature was entitled to consider the general effects of the practices it described, and if the effects were injurious in facilitating unwarranted and misleading claims, to counteract them by general rule even though in particular instances there might be no actual deception or misstatement. This the legislature has done in enacting sections 13(k), 13(l) and 13(m) by restricting the advertising of optometrists within limits which are reasonable and calculated to eliminate the injurious effects of uninhibited advertising. Such legislation comes within the police power and is valid. *Winberry* v. *Hallihan*, 361 Ill. 121, 197 N.E. 552.

"Specific objection is made by appellee to the language of section 13(l) which allows a certificate of registration to be revoked for using directory advertising 'that is substantially dissimilar in size, shape, or color to that used for other practitioners of the healing arts in the same directory'. * * * When the general considerations which have fostered the rule that uniform and subdued methods of advertising are de-

sirable in trades and professions which deal with public health and the treatment of bodily ills are viewed in face of appellee's pleading which admits that the duty placed upon him is neither vague nor uncertain, we must conclude that the regulation tends reasonably to serve a legitimate interest of the public."

The above decision prohibits large telephone directory listings, neon light advertising, and window display advertising by optometrists under an optometry law. It finds such prohibition to be within the police power and reasonably calculated to eliminate injurious effects to the public. Under the strong legal principles heretofore quoted and discussed, that the sale of eyeglasses may be prohibited altogether by merchandisers, and that the whole field, including opticians, must be covered if protection is to be afforded the public, there appears to us absolutely no doubt but that under the police powers a state may prohibit newspaper advertising, radio advertising, large telephone directory ads, and window display advertising, and apply such prohibitions to the whole field involved in furnishing eyeglasses which correct defective vision to the public.

Thus it seems to us that beginning with the *Roschen* and *Semler* opinions from this Court and continuing down to the foregoing well-considered opinion of the Louisiana Supreme Court, the solicitation of the sale of eyeglasses by advertising mediums by all persons, commercial and professional alike, may be prohibited under the police power in the interest of public health and for the welfare and protection of the public.

The following brief extracts from the transcript of record herein disclose how ophthalmologists feel about advertising in the field of visual care:

Dr. Culler (R. 273):

"I am against all forms of advertising and solicitation in regard to the care of the eyes."

Dr. Cordes (R. 295):

Q. "Do you think that in the field of visual care that regulations which protect innocent members of the public by prohibiting bait advertising and other forms of advertising for sale of glasses is good for the public health?

A. Yes, I do.

Q. And public welfare?

A. I do."

Dr. Clay (R. 232):

Q. "Doctor, will you state your opinion as to whether or not you think the solicitation of the sale of eyeglasses should be permitted by anybody through the mediums of advertising?

A. No, I do not."

Dr. Braley (R. 355):

Q. "Do you think that advertising should be permitted with reference to the matter of visual care?

A. Not advertising with reference to visual care. So far as I am concerned, I don't think that there should be any."

In summary, we submit that there can be no doubt about the right of the Legislature to prohibit advertising by professional men such as ophthalmologists and optometrists, and under the clear authority of the cases cited above, the Legislature may so restrict the whole field, including the opticians, in order to afford protection properly to the public. No one has the absolute right to advertise his merchandise if the public health and welfare will or can suffer a detriment therefrom. The sinister advertising program of the respondents, done in violation of the laws of Oklahoma, does not serve the public but rather is the means whereby commercial interests actually engage in the practice of ophthalmology and optometry through their puppet doctors. Deprived of the power of advertising, their venture will fail and the people of Oklahoma will return to professional eye care at the hands of qualified ophthalmologists and optometrists. It cannot be said that this action on the part of the Legislature of Oklahoma does not bear a real and substantial relation to the public's health and welfare.

Third Proposition

The provisions of Section 4 of the Act, prohibiting the corporate practice of Ophthalmology and Optometry in Oklahoma, are valid enactments under the Police Power of the State in the interest of public health and welfare.

Section 4 contains several provisions, but respondents object only to the prohibition against ophthalmologists and optometrists renting space or subleasing departments in which to make eye examinations in retail merchandising establishments. However, in order to understand fully the need for such prohibition, it is necessary to discuss

briefly the entire Section and ascertain the legislative intent and the evils sought to be corrected.

The purpose of Section 4 is to prohibit the corporate practice of ophthalmology and optometry in the State of Oklahoma, or differently said, to eliminate commercial control and influence over the professional practice of ophthalmology and optometry. In effect, Section 4 is a measure regulating the practice of the professions of opthalmology and optometry in Oklahoma. Opticians become involved only as they would attempt the rental of space or subleasing of a department in their retail establishments to doctors and thereby become engaged in the unlawful practice of either the profession of opthalmology or optometry.

Section 4 forbids rebates, the solicitation of business for particular doctors, and then makes it unlawful for a lay person or body *to employ* an ophthalmologist or optometrist to make examinations of the human eye for glasses. The testimony of the respondents, Dr. Rips and Ellis Carp, discloses the evils of the corporate practice of ophthalmology and optometry. The Court will further recognize the difficulty in stamping out corporate practice when collusive cooperation exists between the commercialist and the unprincipled professional man, and they deny secret arrangements and sub rosa understandings with reference to professional practices.

Section 4 does not prohibit an optician from setting up shop in a retail merchandising establishment. It only prohibits the ophthalmologist and optometrist from renting space and locating his professional office in such retail

merchandising establishments wherein he would undertake to render professional services to the public. Such rental prohibition is absolutely necessary to eliminate the loophole whereby commercial control will inevitably be exercised over professional activities through the medium of attractive space or a department in a retail merchandising establishment. Even though all parties concerned may vehemently deny such commercial control, it obviously will be present to the detriment of the public, which is entitled to pure and unadulterated professional eye examinations.

The foundation for all the provisions of Section 4 is the right of the Legislature to regulate the practice of a profession. This legislative right is firmly established by this Court in the *Semler* case, *supra*, wherein we find:

> "Plaintiff is not entitled to complain of interference with the contracts he described, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State. His contracts were necessarily subject to that authority, *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 343, 363; *Union Dry Goods Co.* v. *Georgia Public Service Comm'n*, 248 U.S. 372, 375, 376; *Sproles* v. *Binford*, 286 U.S. 374, 391; *Stephenson* v. *Binford*, 287 U.S. 251, 276. Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We find no basis for the charge of an unconstitutional discrimination. *Watson* v. *Maryland*, 218 U.S. 173, 179; *Miller* v. *Wilson*, 236

U.S. 373, 384; *Missouri ex rel. Horwitz* v. *North*, 271 U.S. 40, 43; *Dr. Bloom, Dentist, Inc.* v. *Cruise*, 288 U.S. 588.

"The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. *Douglas* v. *Noble*, 261 U.S. 165; *Graves* v. *Minnesota*, 272 U.S. 425, 427. The State may thus afford protection against ignorance, incapacity and imposition. *Dent* v. *West Virginia*, 129 U.S. 114, 122; *Graves* v. *Minnesota*, *supra*. We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals (*Miller* v. *State Board of Dental Examiners*, 90 Colo. 193; 8 P.(2d) 699, 287 U.S. 563), and that it may prohibit advertising that tends to mislead the public in this respect. *Dr. Bloom, Dentist, Inc.* v. *Cruise*, 259 N.Y. 358, 363, 182 N.E. 16, 288 U.S. 588."

In the case of *Neill et al.* v. *Gimbel Bros. Inc.* (Pa., 1938), 330 Pa. 213, 199 Atl. 178, we find the above principles applied to the field of visual care, wherein the Court stated:

"The Legislature has the right to forbid, as contrary to public policy, the practice of a profession by a corporation through duly licensed professional men hired by the corporation, since public policy is properly concerned with the maintenance of high professional standards.

"* * * The rule is generally recognized that a licensed practitioner of a profession may not lawfully

practice his profession among the public as the servant of an unlicensed person or a corporation; and that, if he does so, the unlicensed person or corporation employing him is guilty of practicing that profession without a license. A corporation as such cannot possess the personal qualities required of a practitioner of a profession. Its servants, though professionally trained and duly licensed to practice, owe their primary allegiance and obedience to their employer rather than to the clients or patients of their employer. The rule stated recognizes the necessity of immediate and unbroken relationship between a professional man and those who engage his services. It was applied recently in this Commonwealth in the case of lawyers. The judicial branch of government to which is entrusted the regulation of practice by attorneys at law, has never relaxed the rule. * * * In the absence of statutory modification in favor of hospitals or others * * * the same rule applies to physicians and dentists. * * * The position of a physician normally is not that of a servant of any one. * * * As to optometrists, there seems to be a conflict of authority. Undoubtedly the fitting and sale of eyeglasses began as a trade and not as a profession. There is some support in decided cases for the proposition that it must remain a trade, in which an unlicensed person or a corporation may engage as of right, provided the actual work is done by a skilled servant duly licensed. *Dvorine* v. *Castelberg Jewelry Corp.*, 170 Md. 661, 185 A. 562; *Jaeckle* v. *L. Bamberger & Co.*, 119 N.J. Eq. 126, 181 A. 181, *affirmed* 120 N.J. Eq. 201, 184 A. 520; *State ex inf. McKittrick* v. *Gate City Optical Co.*, 339 Mo. 427, 97 S.W.2d 89; *Georgia State Board of Examiners in Optometry* v. *Friedmans' Jewelers, Inc.*, 183 Ga. 669, 189 S.E. 238. See, also, *Sage-Allen Co., Inc.* v. *Wheeler*, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897. The considerations to the contrary seem to us more weighty. In re-

cent times abnormalities of the eye, like those of the teeth, have been found sometimes to indicate and often to result in serious impairment of the general health. The work of an optometrist approaches, though it may not quite reach, ophthalmology. The learning and the ethical standard required for that work, and the trust and confidence reposed in optometrists by those who employ them, cannot be dismissed as negligible or as not transcending the requirements of an ordinary trade. We cannot pronounce arbitrary or irrational the placing of optometry on a professional basis. This conclusion finds support in other jurisdictions. *State ex rel, Beck* v. *Goldman Jewelry Co.*, 142 Kan. 881, 51 P.2d 995, 102 A.L.R. 334 and note; *State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 332; *Eisensmith* v. *Buhl Optical Co.*, 115 W. Va. 776, 178 S.E. 695; *Funk Jewelry Co.* v. *State ex rel. La Prude*, 46 Ariz. 348, 50 P.2d 945; *Bennett* v. *Indiana State Board of Registration and Examination in Optometry*, Ind. Sup., 7 N.E. 2d 977; *State ex rel, Harris* v. *Myers*, 128 Ohio St. 366, 191 N.E. 99; *State ex rel.* * * *"

It would unduly impose upon the time and patience of this Court to quote from the many cases upholding various legislative enactments passed pursuant to their authority to regulate the practice of professions in the public interest to assure the maintenance of high professional standards and treatment. The question of importance herein is whether, under such authority, an ophthalmologist or optometrist may be forbidden from practicing his profession in the midst of a retail merchandising establishment; and does such type of prohibition and the evils intended to be eliminated thereby bear a real and substantial relation to the public health and welfare.

A very recent case regarding the corporate practice f optometrists and the evils and frauds attendant upon octors leasing space in retail establishments in which they rofess to practice their skills as professional men, is from lissisippi. In this case is found many citations on the subect of corporate practice and the leasing of space, and we nvite the Court to read this case in its entirety. For the onvenience of the Court we will extract certain pertinent anguage from this case, which is *Sears Roebuck & Co., t al.* v. *State Board of Optometry* (Miss., 1952), 57 So.2d 26:

"The chancery court in its final decree enjoined Sears and Craftsman from the practice of optometry 'directly or indirectly, and from employing, by any means, registered optometrist or physicians and surgeons to examine the eyes of their customers and prescribe eye glasses in the state of Mississippi.'

"In the clear and comprehensive opinion the chancellor examined the statutes, and said in part as follows: 'The weight of modern authority is against such arrangements as we have here, and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.

" 'It is only in the latter capacity that his status could be legal and his license authoritative in professional relation and service to the public.

" 'The statutory edifice, relating to and regulating optometry in the State of Mississippi, excludes all that it does not include, and merchants and druggists are authorized only to sell and assist purchasers in fitting spectacles and eyeglasses over the counter, and in their place of business at the time of sale.

" 'They are not permitted to hire an optometrist with his license as a screen to hide them from the law while they commercialize the profession, and use him as a handy man to fit and sell glasses as merchandise. In this position the optometrist would be acting as a clerk or salesman, and the employer would in effect be practicing the profession without a license. * * *

" 'It is alleged in defense that the optometrist in this case is not an employee, but is a lessee or tenant of Sears. * * *

" 'Copies of alleged leases, sub-leases, and correspondence agreements, were introduced in evidence to show that the optometrist rents a small space at the Sears' store for $200.00 a month, and in turn sub-rents a part of this space to the Louisiana corporation for $600.00 a month, giving the optometrist a net take of $400.00 a month at the very outset.

" 'The Louisiana corporation is the third party to this triangle, and its business is to supply the glasses which the optometrists sells.

" 'There are other features of these complicated contracts, with their intricate and interlocking arrangements, that are too involved for detailed comment, and which for the present might be passed over.

" 'I am of the opinion, from the evidence, that the optometrist is not renting working space as a tenant in the Sears-Roebuck establishment, but is simply occupying it as an employee or clerk, and that the four hundred-dollar net income from the sub-lease is his assured salary, plus such additional amounts as may have been agreed upon.

* * * * * * * * *

" 'The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which

have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine. Cf. *Semler* v. *Oregon State Board of Dental Examiners*, 148 Or. 50, 53, 34 P. 2d 311. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. *The fact that the optometrist is the employee of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient.*

* * * * * * * * *

" 'We think the case is controlled by *Melton* v. *Carter*, 204 Ark. 595, 164 S.W.2d 453. In that case constitutionality of Act 94 was upheld. It was also said that the legislative object was to prohibit employment of an optometrist by one who is not licensed. In other words, under that decision, "a layman may not engage in the profession by employing a licensed optometrist."

" 'The decree in the instant case found that the lease agreement was collusive — "a fiction for the agency that exists between the parties", as the Chancellor expressed it. We think the testimony sustains this finding.'

"*Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213, 199 Atl. 178 (1938), involved a somewhat similar situation. The store leased to Diamond a portion of its floor space for the operation of an optical department. The court there said that when a lease is accompanied with 'such control as is here shown, the lessee becomes the agent of defendant, and as it is forbidden to practice (optometry), it may not do so through agents.'

"In *State ex rel. Bricker* v. *Buhl Optical Co.*, 131 Ohio St. 217, 2 N.E.2d 601 (1936), the Buhl Optical Company operated an optical dispensary and for a while employed optometrists on a salary. Later the arrangement was changed by a written contract, under which the company leased to several optometrists certain office space in its optical goods store, in consideration of the lessees referring to the company patients for whom they prescribed glasses. For examination the optometrists agreed not to charge more than $1.00, which fees the optometrists alone received. The court held that this arrangement was a subterfuge and that the optical company was in effect still the employer of the optometrists and was violating the statute.

* * * * * * * * *

" 'Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality.' *Rowe* v. *Standard Drug Co.* (Ohio-1937), 132 Ohio St. 629, 9 N.E.2d 609.

"In *State* v. *Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 322 (1933), the State sued to enjoin the defendant corporation from practicing optometry.

* * * * * * * * *

" 'The subtle attempt on the part of the defendant to evade the provisions of the Iowa statutes in reference to the practice of optometry, by employing a licensed optometrist to conduct its business, and by the execution of the alleged lease with its employee, is too patent to appeal strongly to the court of equity. * * *

"'The execution of the so-called lease between the defendant and its employee Jenson, in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the provisions of the statutes herein referred to * * *.'

* * * * * * * * *

"In *Ritholz* v. *Va.*, 35 S.E.2d 210 (Va. 1945), the proprietors of an optical store furnished offices to an optometrist and guaranteed him a minimum income. He collected a $2.00 fee which he retained. He would deliver prescriptions to Ritholz, owner of the optical store. The court discussed a number of cases somewhat similar to the present one, and held that the optometrist was an employee of the store within the prohibitions of the statute; that whether the customers paid a separate fee to the optometrist is not controlling; and that *'the relationship of the parties is not changed by the different methods of payment.'*

"In *State ex rel. Loser* v. *National Optical Stores Co.*, 225 S.W. 2d 263 (Tenn. 1945), the store furnished optometrists with a small office inside the building and guaranteed them a fixed minimum weekly income. The optometrists charged a $2.00 examination fee, which they retained. The court said the activities of the optometrists and the sales of the store were so merged and combined that they constituted a single operation and enterprise; and that the device by which the defendant used the services of the doctors amounted to 'an evasion of the law and is not a *bona fide* arrangement.' See also, *Kindall* v. *Beiling*, 175 S.W. 2d 489 (Ky. 1943); *State ex rel. Standard Oil Company* v. *Superior Court*, 17 Wash.2d 323, 135 Pac. 2d 839 (1943); *McMurdo* v. *Getter*, 10 N.E. 2d 139 (Mass. 1937); Anno., 102 A.L.R. 334, 128 A.L.R. 585, 121 A.L.R. 1455, 141 A.L.R. 883, 888."

The record in this case very plainly shows how the ophthalmologist and the optometrist feels about the corporate or commercial practice of their profession. Brief extracts of their testimony on this point follow:

Dr. Coston (R. 109):

Q. "Do you feel that eye examinations should be done with commercial control and commercial interests predominating?

A. No."

Dr. Culler (R. 273, 274):

Q. "Do you feel that eye examinations should be conducted on a professional basis rather than on a commercial basis?

A. Yes.

Q. Do you think it is a law in the public interest to prohibit ophthalmologists or optometrists from making eye examinations as an employee of any lay group or lay body or commercial interest or commercial enterprise, but rather that they should be limited to making eye examinations as professional men?

A. Yes, I agree to that.

Q. Do you believe any and all measures of legislation which tend to keep eye examinations on a professional basis rather than on a commercial basis is good legislation for the public health and welfare?

A. Yes."

Dr. Braley (R. 354, 360, 362):

Q. "Do you think that human eyesight is a very precious thing?

A. Very valuable, or I would not be in ophthalmology.

Q. Do you think it should be taken care of professionally or commercially?

A. It should be taken care of professionally.

Q. I believe you testified that you believe that the examination of the eyes, and visual care, should be done professionally and not commercially?

A. That is correct. That is what we are striving to get.

Q. Again, in the interest of seeing that defective vision is treated professionally, do you feel that ophthalmologists or optometrists should hire themselves out to the lay person or lay group and make eye examinations for such lay person or lay group?

A. Never.

Q. Do you feel that that arrangement is bad for the public welfare with reference to visual care?

A. I feel that that arrangement is bad for the public welfare.

Q. And this professional service should be free from any commercial control?

A. The professional service should be free from commercial control. I agree to that."

Dr. Cortes (R. 302):

Q. "Do you think that they (ophthalmologists) should set up their office in a retail department store?

A. I do not."

The Oklahoma Legislature, being aware of the many shams and frauds perpetrated through various lease arrangements between a retailer or commercialist and the professional man, *has seen fit to close the door on such subterfuges* and protect the public by requiring the professional man to maintain a professional office and not to practice his profession in the midst of a retail merchandising establishment where he will be subject to commercial control and supervision to the detriment of his patients.

Any property rights which the retail store may have in the matter must be subordinated to the general public interest in the maintenance of high professional standards in examinaing eyes for glasses without commercial control or influence.

CIRCUIT JUDGE MURRAH in his dissenting opinion (R. 65, 66, 67, 68) in digest form has set out the manner and method of the corporate practice now being engaged in by the respondents in the State of Oklahoma contrary to the wishes of its people as expressed by the legislative act under consideration. We respectfully invite your attention to this portion of the dissenting opinion of Circuit Judge Murrah, for it clearly reveals an evil, the eradication of which is within the police power of the State of Oklahoma, which has been rationally and reasonably exercised by Sections 3 and 4 of House Bill 953.

The evils of commercial control of professional activities to the detriment of the public by the practice of giving rebates were so apparent that the Federal Government entered the picture and obtained the injunction of 1950

heretofore cited, against all ophthalmologists as a class and several of the major optical companies.

Respondents rely on the journal entry in the case of *Marks* v. *Frantz, et al.*, entered by the District Court of Sedgwick County, Kansas, as authority that the rental prohibition under consideration herein is void. We have examined the pleadings in this case. A state statute was not involved. All that was involved were rules promulgated by the Kansas Board of Examiners in Optometry pursuant to such authority as had been delegated to them by the Kansas Legislature. The District Court of Sedgwick County only held that the state board, under the authority it had received from the Legislature, was without the power to enact and promulgate such type rules. The court did not say the Legislature of Kansas could not enact such rules into law, but merely that the board had not been so empowered by the Kansas Legislature and such rules were in excess of their delegated power and authority. This is shown by the following quote from the journal entry in this case:

"The court finds that regulation and rule 65-1-3, sub-paragraph 12, of said General Rules of the Kansas State Board of Examiners in Optometry, is without the power of the Board of Examiners in Optometry; and that regulation and rule 65-1-14 is without the power of the Board of Examiners in Optometry; and that said regulations and rules 65-1-3, sub-paragraph 12, and 65-1-14 are invalid and of no force and effect.

* * * * * * * * *

"IT IS BY THE COURT FURTHER ORDERED, ADJUDGED AND DECREED that rule 65-1-3, sub-paragraph 12, and rule 65-1-14 of the General Rules

of the Kansas State Board of Examiners in Optometry are without the power to enact and promulgate by the said Kansas State Board of Examiners in Optometry, and that rule 65-1-3, sub-paragraph 12, and rule 65-1-14 of said General Rules of the Kansas State Board of Examiners in Optometry are and the same are hereby declared invalid and of no force and effect."

It is apparent that the Oklahoma Legislature, in preventing ophthalmologists and optometrists from leasing space or subleasing a department in a retail merchandising establishment, possessed a good knowledge of the means that have been employed in other states to circumvent prohibitions against corporate practice. By Section 4, the Legislature is insisting that the people of Oklahoma receive professional eye examinations, uninfluenced and unhindered by the desire of the retailer or commercialist to sell glasses.

Counterclaim

In the "Amended Answer and Counterclaim of the Appellant, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the Appellants, County Attorneys herein, a verified Counterclaim (R. 22, 23) was made by Appellants against Respondents, as follows:

"For counterclaim against the above plaintiffs, these defendants adopt and incorporate herein the allegations of their foregoing answer and the admitted allegations of the complaint, and allege that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941 to 947) is a valid and constitutional statute of the State of Oklahoma

enacted as a proper exercise of the police power of the state in the interest of public health and welfare, and further allege that plaintiffs are now and have been violating the provisions of said house bill and unless enjoined by this court will continue to do so.

"WHEREFORE, these defendants respectfully ask the court for an order declaring House Bill No. 953 to be valid and constitutional in all respects, and that the court issue its order permanently enjoining plaintiffs from future violations of the provisions of said house bill."

In the event this Court holds that House Bill No. 953, *supra* (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953), is not unconstitutional and void, as contended by respondents, it is clear that respondents have been and are now admittedly violating the provisions thereof.

In this connection, it will be noted that 28 U.S.C.A., covers "Federal Rules of Civil Procedure Rules 1 to 16," and that Rule 13 is in part as follows:

"Rule 13. Counterclaim and Cross-Claim.

* * * * * * * * *

"(b) Permissive Counterclaims. A pleading may state as a counterclaim *any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.*

"(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."

In the case of *Carter Oil Co.* v. *Wood* (1940), 30 Fed. Supp. 875, it is stated:

> "Equity jurisprudence in the United States has always recognized the propriety of cross bills, following the rule that a court of equity has jurisdiction of all cross or counterclaims growing out of and germane and ancillary to the plaintiff's cause of action, even though they could not be pleaded as independent suits within federal jurisdiction. To justify adjudication of a counterclaim, it was only essential that it be of a character making it necessary to realization of complete justice as to the subject matter of the original cause of action. * * *"

It is, therefore, clear that appellants are entitled to have this Court issue an order not only declaring House Bill No. 953, *supra,* to be valid and constitutional but for a further order permanently enjoining respondents from future violations of the provisions thereof.

CONCLUSION

WHEREFORE, premises considered, appellants respectfully ask the Court to hold that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953) is in its entirety a valid and constitutional statute of the State of Oklahoma; to decline to enjoin the appellants, Attorney General of Oklahoma and/or the appellants, County Attorneys of Oklahoma, from enforcing the provisions thereof; and to issue an order permanently enjoining respondents from future violations of the provisions of said Act.

Before concluding this brief appellants deem it proper to inform the Court that the names of Edmund G. Brown, Attorney General of California, and Eimo G. Funke, Assistant Attorney General of California, were placed on this brief "Of Counsel" under authority of their telephone request of January 6, 1955, to the Attorney General of Oklahoma, for the reasons, as stated by them, (1) they were of the opinion that certain principles of law announced in the opinion of the trial court herein, as reported in 120 F. Supp. 128, would, if approved by this Court, invalidate or adversely affect certain pertinent statutes of the State of California, (2) they agreed generally with the position of the Attorney General of Oklahoma herein, and (3) they feared they would not have time to file, as they intend to do, an *amicus curiae* brief in behalf of the State of California in this cause.

Respectfully submitted,

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January, 1955.